



## INTERIOR BOARD OF INDIAN APPEALS

Clair Sutton v. Great Plains Regional Director, Bureau of Indian Affairs

38 IBIA 95 (09/09/2002)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ARLINGTON, VA 22203

CLAIR SUTTON,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 01-178-A
GREAT PLAINS REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	September 9, 2002

Appellant Clair Sutton seeks review of a July 27, 2001, decision issued by the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning the assessment of liquidated damages for violation of the conservation provisions of Winnebago Agency Lease No. 131514-01-06 (lease). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

The lease at issue here covers Allotment No. 0258-1 on the Winnebago Reservation in Nebraska. The term of the lease is 5 years, beginning on March 1, 2001, and ending on February 28, 2006. The leased premises include 160 acres, more or less, of which not more than 138.5 acres are to be cultivated. Paragraph 9 of the Plan of Conservation Operations, which is part of the lease, provides: "No burning of crop or pasture residue shall be permitted without prior written authorization of the Superintendent. LIQUIDATED DAMAGES FOR NON-COMPLIANCE: \$100 PER ACRE."

In response to a report that, on April 9, 2001, burning had been conducted on the leased premises, BIA conducted a field check on April 11, 2001. The BIA inspector verified that oat stubble had been burned in two of the three fields on the allotment. He returned on April 12, 2001, and ran a global positioning system (GPS) unit around the burned areas. He also took pictures of the burned areas.

On April 17, 2001, the Superintendent, Winnebago Agency, BIA (Superintendent) wrote to Appellant. The letter stated that the GPS unit showed that a total of 70.6 acres had been burned in the two fields, and assessed liquidated damages in the amount of \$7,060. The letter further informed Appellant that he had 10 days in which to show cause why he should not be assessed liquidated damages and why the lease should not be cancelled.

Appellant telephoned the Agency on May 2, 2001. The conversation was memorialized in a May 2, 2001, letter from the Superintendent to Appellant. The letter states:

In your phone conversation of May 2, 2001, you indicated you needed to burn the oat stubble in fields 1 and 3 because there were four or five broken straw bales on the allotment. You should have contacted [BIA] Land Operations personnel regarding the disposal of these bales. Agency personnel do not believe your burning of three areas of field 1 and the majority of field 3 is warranted by four or five broken straw bales.

Also, you indicated there were many sand burs in the oat stubble and therefore, you had to burn the oat stubble to kill the sand bur seeds. Agency personnel do not feel that heat from a quick moving grass fire is sufficient to get a significant kill on sand bur seeds. Consequently, the Agency does not believe you had adequate reason to burn nearly all the oat stubble on this allotment. You are reminded that burning crop residue must be preceded by written authorization from the Agency Superintendent.

May 2, 2001, Letter at 1. The Superintendent assessed Appellant \$7,060 in liquidated damages, but did not cancel the lease.

Appellant appealed to the Regional Director. He asserted that the fields were in a mess because the previous tenant had failed to complete work on rebuilding the terraces and waterways and had left big piles of dirt in the field; the oat stubble was primarily cocklebur, sandbur, rag weed, and various other weeds; and there were five large broken bales of straw in the field. Appellant stated that he did not know how he was going to get the land in condition to be farmed. He explained:

Having farmed the Agency ground I overlooked the part of burning stubble account. All I raise is Alfalfa and I had contacted the Agency about burning weeds on the terraces and it was approved, so, this threw me off. Knowing I had to burn the broken, not tied round bales of straw. I started to disc the field but with so much debris I couldn't see where I was going and now I would also have to disc the ground twice and field cultivate it once (to incorporate Treflan for the grass) so I thought I should burn it killing some of the weed seed and I would know where all of the piles of dirt were, plus I would only have to disc it once, spray Treflan for the grass, field cultivate it to incorporate chemical and level out the ridges. By doing it this way there wasn't any erosion. Where if I had not done it this way the ground would have eroded the account, due to the heavy rains that we have received since then.

June 6, 2001, Notice of Appeal to Regional Director at 1-2. Appellant further asserted that he was a good steward of the land, and that "this was not done intentionally." *Id.* at 2. He asked that the liquidated damages be dropped.

The Regional Director issued the decision presently under review on July 27, 2001. Finding that Appellant did not receive written authorization to burn, she upheld the Superintendent's assessment of liquidated damages.

Appellant appealed to the Board. He did not file a brief. The Regional Director filed an answer brief, arguing that her decision should be upheld.

Appellant was informed that he bore the burden of proving error in the Regional Director's decision. His only arguments on appeal are contained in his notice of appeal. That notice states in pertinent part:

As I have tried to explain, in my letter dated June 6th, 2001, I tried everything I know, to get this farm in shape so that I could farm it. The previous tenant should have had this farm in a farmable shape before it was handed to me, so that I could farm it. But this wasn't done.

Also I have not received any help to get it farmable after I had notified the agency about the shape that the farm was in. Although I paid the rent and I did a lot of work to get it farmable which I didn't charge for. I am now penalized. This is not fair. Please accept this as my appeal letter.

Only one issue is raised in this appeal: Did Appellant burn the fields leased to him in violation of Paragraph 9 of the Plan of Conservation Operations? Appellant has admitted that he did. The fact that there were problems with the leased premises did not authorize Appellant to violate the provisions of his lease. Appellant did not seek, and therefore was not granted permission to burn the 70.6 acres at issue here. Under these circumstances, BIA properly assessed the liquidated damages specified in Paragraph 9 of the Plan of Conservation Operations.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's July 27, 2001, decision assessing Appellant \$7,060 in liquidated damages is affirmed.

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Kathryn A. Lynn  
Chief Administrative Judge

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//original signed  
Anita Vogt  
Administrative Judge